Idaho Law Review

Volume 53 | Number 2 Article 7

April 2018

Idaho Wool Growers Association v. Vilsack: A Public Lands Decision that Could Be Tiered to Work for Other Federal Agencies

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IDAHO WOOL GROWERS ASSOCIATION V. VILSACK: A PUBLIC LANDS DECISION THAT COULD BE TIERED TO WORK FOR OTHER FEDERAL AGENCIES

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ABSTRACT

Recently the Ninth Circuit reached a decision that eliminated nearly 70,000 acres of suitable domestic sheep grazing land, when it held that disease transmission between bighorn sheep and domestic sheep was an extremely relevant factor in assessing the high mortality rates of bighorn sheep.[1]

This decision pertained to bighorn and domestic sheep in the Payette National Forest, and could be a pivotal point for agencies to adopt a comprehensive method called tiering. Tiering was created pursuant to the National Environmental Policy Act, and encourages agencies (such as the Bureau of Land Management or the United States Forest Service) to take smaller site specific projects or programs, that require immediate action, and reference a broad Environmental Impact Statement (EIS) created as a programmatic document or regional assessment created earlier in time.[2] There are a handful of requirements that an agency needs to consider before it tiers to a preexisting document; mainly due to extensive case law and the ambiguous statutory language surrounding the National Environmental Policy Act.[3]

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* J.D., University of Idaho College of Law, May 2018. The author would like to thank Professor Stephen R. Miller for his influential guidance and creative ideas that helped shape this article.

1. *See* Idaho Wool Growers Ass'n v. Vilsack, 816 F.3d 1095 (9th Cir. 2016).

2. *See* 40 C.F.R. § 1502.20 (1978); *see also* 40 C.F.R. § 1508.28 (1978).

3. For example, if an agency decides to tier to a broader EA, the document must have been subject to NEPA review. *See* Kern v. United States Bureau of Land Mgmt., 284 F.3d 1062, 1073 (9th Cir. 2002). Furthermore, courts have held that "[a] NEPA document cannot tier to a non-NEPA document." *See* Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 998 (9th Cir. 2004).

The 2010 Supplemental EIS (SEIS) was an endeavor to amend the 2003 Southwest Idaho Ecogroup Land and Resource Management Plan Final EIS (FEIS) for the Payette National Forest.[4] The Land and Resource Management Plan was a regional planning effort to revise the 1988 Payette National Forest Land and Resource Management Plan (Forest Plan), which was required by the National Forest Management Act.[5] The 2010 SEIS is a product of agency analysis coupled with some of the most recent and pertinent scientific literature addressing disease transmission from domestic sheep to bighorn sheep because it withstood numerous appeals and made it through the litigation process. That document, coupled with the national guidelines and objectives fashioned by the Wild Sheep Working Group,[6] could be used by other agencies in similarly situated circumstances to decrease the extreme workload that those agencies experience when creating an EIS or Environmental Assessment (EA) for their own projects that address bighorn sheep viability.

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4. *See* U.S. DEP'T OF AGRIC., FOREST SERV., PAYETTE NATIONAL FOREST: RECORD OF DECISION LAND AND RESOURCE MANAGEMENT PLAN 1 (2010), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5238683.pdf [hereinafter *Payette Record of Decision*].

5. *Id.*

6. *See generally* WESTERN ASSOCIATION OF FISH AND WILDLIFE AGENCIES , WILD SHEEP WORKING GROUP, RECOMMENDATIONS FOR DOMESTIC SHEEP AND GOAT MANAGEMENT IN WILD SHEEP HABITAT (2012) https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5385708.pdf [hereinafter WILD SHEEP WORKING GROUP].

I. INTRODUCTION

Growing up in agriculture may give a person a one-sided perspective of how federal agencies should manage public lands. Agriculturists must follow strict regulations when it comes to grazing on public lands. To these agriculaturlist it may never occur to them why those regulations are in place, other than to dismantle public grazing opportunities. On the other end of the spectrum, someone who never grew up around agriculture maybe skeptical as to why industrialists and agriculturists are able to use public lands to gain an economic advantage. A young agriculturist may choose a path of harvesting, or may deviate down another. A young agriculturist may wonder why the government has imposed such harsh regulations; or why the government seems unfair or severe in its consequences when they miss a deadline to renew a lease, file an appeal, or follow strict grazing guidelines. It may never occur to that young agriculturist that federal agencies have a much bigger agenda—that is to manage the lands that are under their umbrella to the best of their ability with the public's interest in mind. Ironically enough, after a young agriculturist matures and experiences handling others' public lands, they may learn to ask questions and look at the big picture with more than one logical perspective in mind. That big picture question is whether agriculturists, miners, timber harvesters, and environmentalists in the present period are doing the right thing for the public resources so that future generations will be able to cherish those public resource lands like generations before them have.

Since the inception of "public lands," agriculturists and other industrialists have used the land to pursue capitalistic ventures such as ranching, mining, or timber harvesting; while recreationalists have used the land for enjoyment and pleasure. Public lands have long been analyzed using Harding's "Tragedy of the Commons": public lands were overgrazed, overused, and not maintained prior to the enactment of federal regulations, which changed that outlook and strategy in full swing.[7] In 1870 there were 4.1 million beef cattle and 4.8 million sheep being grazed over 17 western states.[8] By 1900, only thirty years later, both cattle and sheep

7. *See generally* Garrett Hardin, *Tragedy of the Commons*, 162 SCI. 1243 (1968).

8. *History of Public Land Livestock Grazing*, U.S. DEP'T OF INTERIOR, BUREAU OF LAND MGMT., https://www.blm.gov/nv/st/en/prog/grazing/history_of_public.html (last visited Feb. 13, 2017).

numbers had more than quadrupled, which likely degraded the public lands.[9] The adverse impacts to federal lands prompted legislation that created stability for ranchers and industrialists across the west, but also reduced the numbers of cattle and sheep that were allowed to graze on public lands, and regulated industrial operations such as mineral extraction and timber harvesting.[10]

Beginning in 1970 when Congress passed the National Environmental Policy Act, followed by the Federal Land Policy and Management Act in 1976, these statutes shifted the thinking and usage of public lands from what the land can do for us, to what we, as the general public, including agriculturists and industrialists, can do for the land. This mindset has been pursued from multiple angles by a number of groups, both for and against public grazing, but has unilaterally focused on finding a way to sustainably balance the best uses for federal lands. This balance has been negotiated through agency regulation, Congressional legislation, as well as judicial interpretation. Litigation has served as a sought-after method to determine how public lands will be used during the present day and will likely continue to reflect how public lands will be used in the future.

As Winston Churchill once said, "[t]hose that fail to learn from history are doomed to repeat it."[11] Speaking for the majority of the population, it is probably in our best interest to maintain our public resources so that future generations have the ability to experience, use, and prosper from those resources. Public lands and the native species, including fish, wildlife and plants, must be protected; on the other hand, public lands should not sit idle without stewards tending to it. Those stewards of the public lands should be held accountable for their actions in maintaining public lands. By overusing our public resources, we are probably altering them as well; going forward, the management of our public lands should

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9. *See id.*

10. *See id.*

11. *Famous quotations and quotes about Learning from History*, AGE-OF-THE-SAGE.ORG, http://www.age-of-the-sage.org/philosophy/history/learning_from_history.html (last visited Dec. 15, 2016).

be planned and controlled, not left to arbitrary discretion and decision-making.[12]

In recent decades, environmental groups have not only heavily lobbied in state and federal legislatures regarding public lands, but have correspondingly relied on the judiciary to challenge the decision-making of agencies regarding public lands.[13] These lawsuits have been spurred by private citizens and private organizations, challenging the validity of an agency's decision-making and environmental impact analyses of public lands that can range from endangered species preservation to livestock degradation to mineral extraction. However, sometimes agencies may present new grazing or mineral extraction guidelines that agriculturists and industrialists are not pleased with, which often sparks litigation from organizations on the other side of the aisle.[14]

The reduction of domestic sheep grazing allotments in the Payette National Forest led to litigation that evolved into *Idaho Wool Growers Ass'n v. Vilsack*, a case that was brought in the Federal District Court of Idaho and then subsequently appealed to the Ninth Circuit.[15] In *Idaho Wool Growers Ass'n*, a private agriculture advocacy group brought a lawsuit against Tom Vilsack, the Secretary of Agriculture, and the United States Department of Agriculture-Forest Service regarding a decision reached in an amendment to the 2003 Southwest Idaho Ecogroup Land and Resource Management Plan.[16] The decision was released through a SEIS in 2010, and found that domestic sheep grazing in the Payette National

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12. *See generally* S. COMM. ON INTERIOR AND INSULAR AFFAIRS & H. COMM. ON SCI. AND ASTRONAUTICS , 90TH CONG, A NATIONAL POLICY FOR THE ENVIRONMENT (Comm. Print 1968), https://www.transit.dot.gov/regulations-and-guidance/environmental-programs/congressional-white-paper-national-policy.

13. Groups such as the Sierra Club Foundation and Western Watersheds Project continually use their funds to fight for the most progressive outcomes on public lands that would help preserve and protect the land for future generations. *See What we fund*, SIERRA CLUB FOUND., http://www.sierraclubfoundation.org/what-we-fund (last visited Apr. 9, 2017). *See also Public Lands Ranching – The Ecological Costs of Public Lands Ranching*, WESTERN WATERSHEDS PROJECT, https://www.westernwatersheds.org/public-lands-ranching/ (last visited Apr. 9, 2017).

14. *See, e.g.,* Idaho Wool Growers Ass'n v. Vilsack, 816 F.3d 1095 (9th Cir. 2016).

15. *Id.*

16. *Id.*

Forest would need to be reduced by nearly seventy percent.[17] This reduction was proposed in order to protect the viability of bighorn sheep against the risk of disease transmission from domestic sheep.[18] Extensive scientific literature was incorporated into the Forest Service's decision to reduce the number of domestic sheep from grazing near bighorn sheep habitat areas so that commingling and contact between the two species would theoretically be reduced.[19]

The focus of this case note is whether federal agencies that manage domestic sheep grazing allotments, which land on or near bighorn sheep viability areas, could use the broad EIS that was created for the basis of the decision in Payette National Forest, couple it with a regional or national uniform set of guidelines and objectives that focus on bighorn sheep viability, and tier to it in order to make correspondingly correct decisions for their own locations.

Tiering can be defined as the process by which federal agencies evaluate broadly applicable issues in an EIS or EA for a proposed federal action.[20] After the broad EIS or EA has been conducted, federal agencies can reference and summarize, or "tier" to, the prior document when evaluating a site-specific action.[21] This process allows federal agencies to avoid duplicative paper work, and unnecessarily waste time trying to create separate EISs for the land that they manage. In understanding the analysis, this case note will expend a reasonable amount of time relaying the underlying facts that played an important part of the overall decision reached by the Ninth Circuit in *Idaho Wool Growers Association*, while looking at the most relevant statutes and case law that could provide a solution for this unique problem that surrounds bighorn sheep and domestic sheep. The National Environmental Protection Act, Code of Federal Regulations, National Forest Management

17. *Idaho Wool Growers Ass'n*, 816 F.3d at 1098.

18. *Id.* at 1099.

19. *See generally Payette Record of Decision*, *supra* note 4.

20. 40 C.F.R. § 1508.28 (1978).

21. *See id.*

Act, Federal Land Policy and Management Act, and case law provide the most current and applicable standards that should be followed if a federal agency is going to tier its work to prior documents that were created for the same issue.

II. A BROAD HISTORY OF DOMESTIC SHEEP GRAZING AND BIGHORN SHEEP IN IDAHO

In the Payette National Forest, bighorn sheep are found in two distinct areas—in Hells Canyon and in the Salmon River Mountains.[22] During the past 130 years, bighorn sheep have experienced major die-offs,[23] which coincidentally began when ranchers began using public lands to graze their domestic sheep.[24] These die-offs accumulated into thousands of bighorn sheep dying in the Payette National Forest.[25] Bighorn sheep populations have encountered a forty-seven percent die-off rate since 1981.[26] To illustrate this extreme decrease in bighorn sheep, a survey, conducted by the Forest Service in 1990, found there was estimated to be over 3,800 bighorn sheep located in Idaho.[27] Only eight years later, the estimated

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22. *Idaho Wool Growers Ass'n*, 816 F.3d at 1099.

23. A die-off occurs when "large numbers of a species, population, or community" are suddenly reduced or naturally perish. DICTIONARY.COM, http://www.dictionary.com/browse/die--off (last visited Feb. 13, 2017).

24. *Idaho Wool Growers Ass'n*, 816 F.3d at 1099.

25. *See generally Payette Record of Decision*, *supra* note 4.

> More than 10,000 bighorn sheep may have once lived in the Hells Canyon and surrounding mountains, but they were extirpated by the mid-1940s. Through reintroduction, 474 bighorn sheep were transplanted into Hells Canyon between 1971 and 2004. Seven die-offs have been reported since 1971. Today, the population is estimated at 850 animals.

Id. at 6.

26. *Idaho Wool Growers Ass'n*, 816 F.3d at 1099.

27. U.S. DEP'T OF AGRIC. FOREST SERV., INTERMOUNTAIN REGION, RISK ANALYSIS OF DISEASE TRANSMISSION BETWEEN DOMESTIC SHEEP AND BIGHORN SHEEP ON THE PAYETTE NATIONAL FOREST 2 (2006), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwiypuO3n9HRAhVWwGMKHa__BxAQFggaMAA&url=https%3A%2F%2Fwww.fs.usda.gov%2FInternet%2FFSE_DOCUMENTS%2Ffsm9_033021.pdf&usg=AFQjCNGY7d4e4qvlVofNfXyOgXNemlrRPQ&bvm=bv.144224172,d.cGc [hereinafter RISK ANALYSIS OF DISEASE TRANSMISSION].

number was found to have fallen to less than 1,800.[28] The die-offs have continued to occur despite efforts by federal agencies to transplant new sheep into the area from different locations.[29] These transplant efforts began in the 1970s and lasted into the last decade of the twentieth century.[30]

In 2010, the United States Department of Agriculture Forest Service released the Final Supplemental EIS (FSEIS) with the purpose of supplementing the Southwest Idaho Ecogroup Land and Resource Management Plan FEIS, which had been completed in 2003.[31] The amendment to the 2003 Final Forest Plan was driven by nearly half a dozen appeals that mainly sought to persuade the Forest Service to reexamine the viability of bighorn sheep in the Payette National Forest.[32] These appeals were received between the release of the Final Forest Plan in 2003 and March 9, 2005.[33] On March 9, 2005 the Chief of the Forest Service concurred with the appellants that the discussion of the "cumulative effects pertaining to bighorn sheep [in the Payette National Forest] did not adequately address viability [of the species] and reversed the Intermountain Regional Forester's 2003 decision to approve revised management direction for the Hells Canyon Management Area as it pertain[ed] to bighorn sheep and its habitat."[34]

Since 1915, the number of domestic sheep permitted to graze in the Payette National Forest has been reduced by over 150,000 animals.[35] These reductions have been made in conformance with

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28. *Id.*

29. *Idaho Wool Growers Ass'n*, 816 F.3d at 1099.

30. RISK ANALYSIS OF DISEASE TRANSMISSION, *supra* note 27, at 2.

31. U.S. DEP'T OF AGRIC. FOREST SERVICE, INTERMOUNTAIN REGION, SOUTHWEST IDAHO ECOGROUP LAND AND RESOURCE MANAGEMENT PLANS: FINAL SUPPLEMENTAL EIS i (July 2010), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5238681.pdf [hereinafter SOUTHWEST IDAHO ECOGROUP].

32. *See id.*

33. *See id.*

34. *Id.*

35. *See* Payette Record of Decision, *supra* note 4, at 6.

the needs and conditions of the Payette National Forest, as the forest service supervisor has deemed fit over time.[36] A major reason for the reduction in domestic sheep grazing near bighorn sheep populations is the probability of disease transmission between bighorn sheep and domestic sheep.[37] According to the United States Department of Agriculture-Forest Service's Record of Decision (ROD), the Forest Supervisor noted that: "[e]xtensive literature supports the relationship between disease in bighorn sheep populations and contact with domestic sheep, although the mechanisms of disease transmission are not fully understood."[38] The disease that causes bighorn sheep die-offs is pneumonia; the bacteria is carried by domestic sheep, which are not susceptible to the disease, like bighorn sheep are.[39] The Forest Service Supervisor noted a number of other factors that could have a detrimental impact on bighorn sheep, but ultimately those were not as heavily weighted as the possibility of disease transmission between bighorn sheep and domestic sheep.[40]

The potential for disease transmission has been studied from a multitude of angles by a handful of researchers; most of those angles seem to conclude that there is a common occurrence of higher mortality rates when bighorn sheep come into contact with domestic sheep.[41] One of the most recent studies conducted in 2010, on three independent research grounds, separated twenty-three bighorns into ten different pens giving bighorn sheep the ability to commingle with domestic sheep or come into contact with them along a fence line.[42] As a result, all twenty-three bighorn sheep either died of respiratory disease or had to be euthanized due to their

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36. *See id*.

37. *Id.*

38. *Id.*

39. *Id.* at 7.

40. *See* SOUTHWEST IDAHO ECOGROUP , *supra* note 31, at i.

41. *See generally* Tristan Howard, *Bighorns' Deadliest Obstacle: Domestic Sheep Disease* (2012), www.idahowildsheep.org/2012/Biology_Policy_Controversy_ID_WSF.pdf. There have been numerous studies conducted involving confined bighorn and domestic sheep which have confirmed a fatal disease connection. There have also been a large number of documented cases in the wild to buttress the connection as well. *Id.* at 4.

42. *Id*. at 5.

proximity to death.[43] This evidence tends to lend credibility to the argument that there is a sufficient link between the mortality rate of bighorn sheep and the contact that occurs with domestic sheep.

III. BIGHORN SHEEP ON A NATIONAL SCALE

In Idaho Wool Growers Ass'n v. Vilsack, the Ninth Circuit noted:

> Between the late 1800s and the early 1900s, the number of bighorn sheep in North America declined dramatically, falling from a high of 1.5 to 2 million individuals to approximately 10% of that number. Scientists have generally attributed the decline to over-harvesting, habitat loss, competition for food, and disease transmission from domestic sheep.[44]

Clearly, even the layman could recognize that there is a problem relating to the dramatic decrease in bighorn sheep populations. However, the solution appears to be more complex than spotting the problem itself and attempting to adjust from that point.

The findings by the Forest Service in *Idaho Wool Growers Ass'n v. Vilsack* presented a particular problem that many agencies across the country, specifically in the Northwest, have faced or will face. The problem, is creating an EIS that correctly analyzes the cumulative impacts of disease transmission between bighorn and domestic sheep across all landscapes, but mainly caters to the Northwestern region of the United States where bighorn sheep were once abundantly found but have since dramatically declined. That cumulative impacts analysis must not only take into account past and present actions that have affected bighorn sheep viability, but also reasonably foreseeable future events that could possibly lead to the decline in numbers of bighorn sheep.[45]

Across the United States, bighorn sheep populations range as far east as Nebraska and the Dakotas, down to Texas and New

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43. *Id.*

44. Idaho Wool Growers Ass'n v. Vilsack, 816 F.3d 1095, 1098 (9th Cir. 2016).

45. *See* 40 C.F.R. § 1508.7 (1978).

Mexico, and up through Nevada, Idaho, Utah, Oregon and Washington.[46] Looking back at the last decade of the twentieth century, there were 340 recognized herds in the United States.[47] Those recognized herds were scattered across 14 states and compiled roughly 42,700 animals in total.[48] The sporadic settlement of bighorn sheep is due to the patchy nature of their preferred habitat.[49] The preferred habitat of bighorn sheep ranges from mountainous regions to drought ridden deserts, and everything in between.[50] The vast number of bighorn sheep occupy public lands, giving Federal and State agencies the ability to monitor the viability of the species.[51] Due to the diverse ecosystems that bighorn sheep continually use for habitat, their movement across those ecosystems can be influenced by direct and indirect human and animal intervention factors.[52] All of these factors have the same denominator; that denominator is that bighorn sheep viability can be properly managed by Federal agencies to ensure the longevity of the species, especially if the bighorns' habitat falls on public lands.

IV. THE REGIONAL ASSESSMENT DOCUMENT PREPARED BY THE WILD SHEEP WORKING GROUP

In 2012, the Western Association of Fish and Wildlife Agencies (WAFWA), which comprised federal agencies from twenty-three

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46. Marco Festa-Bianchet, *Ovis Canadensis*, THE ICUN RED LIST OF THREATENED SPECIES (2008), http://www.iucnredlist.org/details/15735/0.

47. *Id.*

48. *Id.*

49. JOHN J. BEECHAM ET. AL, USDA FOREST SERV, ROCKY MOUNTAIN BIGHORN SHEEP (OVIS CANADENSIS): A TECHNICAL CONSERVATION ASSESSMENT 18 (2007), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5181936.pdf.

50. *See id.* at 21.

51. *See id.* at 36.

52. *SEE* CLAY BREWER ET. AL, WESTERN ASSOCIATION FO FISH AND WILDLIFE AGENCIES, WILD SHEEP WORKING GROUP, BIGHORN SHEEP: CONSERVATION CHALLENGES AND MANAGEMENT STRATEGIES FOR THE 21ST CENTURY 4 (2014), https://www.wildsheepfoundation.org/cache/DOC51_2014-07BighornSheepConservationChallenges-ManagementStrategies-21stCentury-Reduced.pdf?20160718023559.

different states and provinces, met to create a uniform set of recommendations that different state, provincial, and Federal agencies could tier their management actions to.[53] These recommendations were prepared to assist federal, state, and private organizations in taking the appropriate steps to eliminate range overlap, and thereby, hopefully reduce the possibility of disease transmission between domestic sheep and bighorn sheep.[54] The proposal by WAFWA calls for effective separation of domestic sheep and bighorn sheep.[55] Effective separation is defined "as spatial or temporal separation between wild sheep and domestic sheep or goats to minimize the potential for association and the probability of transmission of diseases between species."[56] This type of separation does not explicitly call for total removal of domestic sheep, but implicitly suggests that separation will help alleviate the possibility of disease transmission between the two species.[57]

Through a number of extensive studies, the WAFWA found that during the winter of 2009-2010, bighorn sheep populations experienced die-offs of an estimated 880 animals that correspondingly affected nine herds in Montana, Nevada, Washington, Utah, and Wyoming.[58] Die-offs have been noted in the absence of overlapping range sharing and non-contact between bighorn sheep and domestic sheep; but it has been noted that when range overlapping does occur the likelihood of contact between bighorn sheep and domestic sheep impacts the number of bighorn sheep that could potentially be susceptible to disease transmission.[59]

The Wild Sheep Working Group produced another document in 2014, which analyzed the challenges facing bighorn sheep in

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53. *See* WILD SHEEP WORKING GROUP, *supra* note 6, at 3.

54. *See id.* at 2.

55. *See id.* at 6.

56. *Id.*

57. *See id.*

58. *Id.* at 5.

59. WILD SHEEP WORKING GROUP, *supra* note 6, at 5.

North America.[60] These challenges included "habitat, disease, predation, population management, organizational hurdles, and climate change."[61] It is important to note that disease transmission has not been the single influential factor of bighorn sheep die-offs. Rather, human intervention and movement through bighorn sheep habitat in conjunction with competition to limited resources, has had an underlying effect on bighorn sheep mortality rates.[62] Yet, based on the most pertinent research available, the risk of disease transmission in Idaho is rated on an importance level of "high" by WAFWA.[63]

V. TIERING AS PRESCRIBED BY NEPA

Tiering was introduced in the 1970s as a prescription to help agencies become more efficient in creating their EIS and EA.[64] This legal concept was enacted through the Code of Federal Regulations, which subsequently was mandated by the National Environmental Policy Act (NEPA) of 1970.[65] NEPA is a purely procedural statute enacted to ensure the public that federal agencies will take a hard look at the environmental consequences of any proposed decisions before finding that a proposed action or project should be enforced; conversely, NEPA does not establish substantive environmental standards.[66] The epicenter of NEPA revolves around the EIS.[67] The statute requires that any significant action taken by a federal agency, that would affect the quality of the publics' environment, should be preceded by an impact statement which would affect the agency's decision to change preceding practices or pro-

60. *See* BREWER ET. AL, *supra* note 52, at 2–3.

61. *Id.* at 3.

62. *Id.* at 6–8.

63. *Id.* at tbl.1.

64. *See Part 1502 – EIS*, https://ceq.doe.gov/nepa/regs/ceq/1502.htm. (last visited Nov. 2, 2016). The incorporation of tiering was introduced in legislation for the Environmental Quality Improvement Act of 1970. *Id.*

65. *See* 40 C.F.R. § 1502.20 (1978).

66. Kern v. United States Bureau of Land Mgmt., 284 F.3d 1062, 1066 (9th Cir. 2002).

67. *See* 40 C.F.R. § 1502.2 (1978).

pose new projects that would have adverse effects on the environment.[68] The regulations require agencies to create a list of alternatives, assess those alternatives, and create a plan of action that would use the most practical alternative to benefit both the environment and the public in general.[69]

Legislative and executive action set three main goals for establishing uniform procedures for implementing NEPA,[70] and those goals were probably pretty lofty looking in retrospect. The principal goals were to "reduce paperwork, to reduce delays, and to produce better decision[s]."[71] Tiering was a controversial implementation at the time,[72] but has likely been one of the most successful rules at accomplishing the goals laid out by the government.

The practice of creating EISs is often strenuous and time consuming, amassing hundreds of hours of research alongside the completion of the necessary reports for NEPA review.[73] A study conducted between 1998 and 2006 found that to create an EIS the time range could range from 51 days to 6,708 days, or slightly more than eighteen years.[74] However, the average timeline for the creation of an EIS usually lasted just under three and a half years.[75] Attempts to streamline the EIS preparation process by federal agencies usually failed, requiring the agency to create a new EIS.[76]

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68. *Id.*

69. *Id.*

70. National Environmental Policy Act Regulations Implementation of Procedural Provisions, 43 Fed. Reg. 55,978 (July 30, 1979).

71. *Id.*

72. *See id.* at 55,984. Some commenters were against the incorporation of tiering because it would add additional work to the environmental review process. *Id.*

73. *See generally* Piet deWitt & Carole A. deWitt, *How Long Does it Take to Prepare an EIS?*, ENVTL. PRAC. 14 (2008).

74. *Id.*

75. *Id.*

76. *Id.*

NEPA was adopted with the intent to provide information on environmental impacts to decision-makers in federal agencies contemplating federal projects that could potentially impact the environment.[77] It can be further described as having "twin aims."[78] "First, it places upon [a federal] agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process."[79] However, the brief and vague statutory language of NEPA has required courts and agencies to fill in the gaps through regulations, guidance, and judicial decisions.[80] The main enforcement mechanism that oversees agencies while they are creating these EISs is the Council on Environmental Quality, more broadly known as the CEQ.[81] NEPA assigns the CEQ with the task of ensuring that federal agencies meet their obligations under the Act and to help further preserve the environment.[82]

The Code of Federal Regulations has two pertinent statutes that revolve around the concept of tiering. Those statutes include 40 C.F.R § 1502.20 and 40 C.F.R. § 1508.28.[83] Both of these regulations give general guidance as to what is expected of agencies, but like most parts of environmental law, the language can appear broad and vague from the outset. 40 C.F.R. § 1502.20 sets out some preliminary principles regarding when, and if, tiering is a permissible solution for the agency contemplating the creation of an EIS or EA.[84] It encourages, rather than mandates, that tiering should be used as a strategy to deviate from repeated discussions of the

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77. COUNCIL ON ENV'T QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, A CITIZEN'S GUIDE TO THE NEPA 1–2 (2007).

78. Kern v. United States Bureau of Land Mgmt., 284 F.3d 1062, 1066 (9th Cir. 2002) (citing Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 97 (1983)).

79. *Id.*

80. *See generally* DANIEL R. MANDELKER ET AL., HOW NEPA APPLIES TO FEDERAL AGENCIES, NEPA LAW AND LITIG. § 1:3 (2d ed. 2016).

81. *The Council on Environmental Quality*, NAT'L ENV'T POLICY ACT, https://ceq.doe.gov/ (last visited Apr. 9, 2017).

82. *Id.*

83. *See* 40 C.F.R. § 1502.20 (1978); *see also* 40 C.F.R. § 1508.28 (1978).

84. *See generally* 40 C.F.R. § 1502.20 (1978).

same issues in the EIS or EA.[85] When an agency has created a broad EIS, the statute reflects that an agency can utilize tiering if there is another subsequent statement that needs to be prepared and that the subsequent statement "need only summarize the issues discussed in the broader statement."[86] This allows the agency to focus on the specific issues related to the subsequent action or actions for which an agency has been tasked to prepare an EIS.[87]

The second regulation, 40 C.F.R. § 1508.28, covers some of the same preliminary principles discussed in the first, but delves into more definitional detail.[88] It states that tiering is appropriate when the "sequence of statements or analyses is: (a) from a program, plan, or policy EIS to a program, plan, or policy statement or analysis of lesser scope, or to a site-specific statement, or analysis."[89] From this perspective it is inferred that tiering can be used to cover ground down the funnel, and cannot be used to look at issues that are broader than those already recited in the EIS. The regulation further notes that tiering is appropriate when it supports the initiative of the lead agency to key in on the issues that are ripe for discussion, and exclude issues that are moot.[90] Two subcategories that have been derived from tiering are chronological tiering, and geographical tiering; both have distinct features.[91]

A. Chronological Tiering

Stated generally, through the implementation of NEPA, Congress likely presumed a proposed project of a federal agency was a one-time decision in which a federal agency would take action or stand aside. Quite a few programs and projects actually proceed

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85. *Id.*

86. *Id.*

87. *Id.*

88. *See generally id.* § 1508.28 (1978).

89. *Id.*§ 1508.28.

90. *Id.*

91. GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, PUBLIC NATURAL RESOURCES LAW § 17.27 (Thomas Reuters, 2d ed. 2016).

step by step, rather than taking one big leap toward the end goal.[92] When, and whether, an EIS should be prepared is a timing issue that is circumscribed by chronological tiering.[93] This subcategory of tiering mainly surrounds the issue of when an agency should be required to prepare an EIS before they exchange federal lands, or grant a permit for mineral extraction,[94] but could likely pertain to any federal project. As noted earlier, NEPA and CEQ regulations require agencies to assess reasonably foreseeable impacts at the earliest point in time before the agency makes a commitment that affects the land and cannot be retracted.[95] The timing of the creation of the EIS is critical when looking at the scope of chronological tiering.

This subcategory does not apply to *Idaho Wool Growers Ass'n v. Vilsack* for two distinct reasons. First, the court in that case dealt with disease transmission between bighorn sheep and domestic sheep.[96] It did not deal with leasing out federal lands for mineral extraction or exchanging federal lands with private parties.[97] The emphasis of timing in a case such as disease transmission is uniquely different than that of extracting minerals or exchanging federal lands. Disease transmission is a problem that has occurred over a long stretch of time and could not likely be cured by one EIS produced through NEPA review. Contrarily, when a federal agency allows a permit for mineral extraction or decides to exchange lands, that is a one-time occurrence that can be fully analyzed through a detailed EIS.

Second, the Forest Service took the required steps under NEPA regulations to prepare an overall EIS that resulted in the 2003 Forest Plan. Due to appeals received by the agency, the Chief of the Forest Service timely reversed the alternative proposed in the 2003 FSEIS, instructing the supervisor for the Payette Na-

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92. *Id.* at § 17.26.

93. *Id.*

94. *Id.*

95. *See supra* Section V.

96. *See* Idaho Wool Growers Ass'n v. Vilsack, 816 F.3d 1095 (9th Cir. 2016).

97. *Id.*

tional Forest to complete a viability assessment pertaining to bighorn sheep in the Payette National Forest.[98] That document and the alternative selected from the 2003 FSEIS were the cause of action in *Idaho Wool Growers Ass'n v. Vilsack*, which correspondingly did not have an effect on the timing related to creating the EIS.[99] Therefore, chronological tiering was not at issue when looking at the merits of *Idaho Wool Growers Ass'n*, nor would it likely be a hurdle for other Federal agencies creating an EIS or EA relating to bighorn sheep viability in other locations.

B. Geographical Tiering

On the other side of the coin, geographical tiering encompasses whether one or more EISs are necessary to meet the federal requirements for that proposed action.[100] Programs that are comprised of various parts have difficulty tracing NEPA because NEPA is relatively vague regarding whether an EIS needs to be created for an entire concept, project-by-project, or both.[101] The main case that gave the most explicit answer to this entangled concept was *Kleppe v. Sierra Club*.[102]

In *Kleppe v. Sierra Club*, the Department of Interior and a number of other federal agencies were named defendants in an action brought by a number of environmental groups. These environmental groups alleged that the defendants had the responsibility and requirement of preparing a region-wide, comprehensive EIS relating to coal reserves located on federally owned or federally managed lands.[103] The Northern Great Plains region encompasses certain portions of four states; Wyoming, Montana, North Dakota, and South Dakota.[104] All of the states have certain areas that are

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98. *Id.* at 1099.

99. *Id.* at 1101–02.

100. GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, *supra* note 91, at § 17.27.

101. *Id.*

102. *Id.* at n.1.

103. Kleppe v. Sierra Club, 427 U.S. 390 (1976).

104. *Id.* at 396.

rich in coal.[105] Prior to the lawsuit, three studies had been conducted that looked at different aspects of prospective industrial action.[106] In the final study, the Northern Great Plains Resources Program (NGPRP) was devoted in its entirety to studying "social, economic and environmental impacts" in the states revolving around coal extraction.[107] While this study was being conducted, the Department of Interior engaged in a complete review of its coal-leasing program for the entire Nation,[108] which resulted in a programmatic EIS.[109] The program's primary purpose was to study environmental impacts of coal-related activities and to create a uniform planning system that would guide federal agencies in its respective decisions to conform with the national leasing program.[110] The issue that arose in this case was whether NEPA required agencies under the Department of Interior to prepare EIS that was specifically tailored to the Northern Great Plains region.[111]

The major holdings reached in *Kleppe*, "indicate[d] that EISs are required for (1) national programs, (2) individual projects or groups of projects within the program, and (3) any intermediate actual proposal of the agency—whenever the proposed action on any level will have significant environmental consequences."[112] Therefore, an EIS had to be created for any coal leases that affected the region relating to smaller projects. These holdings provide insight for geographical tiering, even though tiering was not explicitly mentioned by the Supreme Court in its decision. Tiering can occur on a broad scale to a very narrow scale, but it all depends on the project that is before the federal agency.

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105. *Id.*

106. *See id.* at 397.

107. *Id.*

108. *Id.*

109. Terence L. Thatcher, *Understanding Interdependence in the Natural Environment: Some Thoughts on Cumulative Impact Assessment under the National Environmental Policy Act*, 20 ENVTL. L. 611, 615 (1990).

110. *Kleppe*, 427 U.S. at 398.

111. *Id.*

112. GEORGE CAMERON COGGINS & ROBERT L. GLICKSMAN, *supra* note 91, at § 17.27.

VI. WILDLIFE VIABILITY ASSESSMENTS AS MANDATED BY THE NATIONAL FOREST MANAGEMENT ACT

Another beneficial statute that should be addressed due to its commingling effects with NEPA, and *Idaho Wool Growers Ass'n v. Vilsack*, is the National Forest Management Act (NFMA). Under the NMFA of 1976, and the 1982 NFMA Implementing Regulations, forest managers have a duty to create a management plan that protects the viability of fish and wildlife in respect to their habitats.[113] Section 219.19 of the 1982 NFMA Implementing Regulations states that:

> [F]ish and wildlife habitat shall be managed to maintain viable populations of existing and desired non-native vertebrae species in the planning area. For planning purposes, a viable population shall be regarded as one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area. In order to insure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area.[114]

This denotes that forest managers, like the one in charge of the Payette National Forest, have to present a plan that will maintain viable populations of bighorn sheep. A report was first completed in the 2003 FEIS, but then subsequently substituted with the 2010 SEIS, that directly analyzed the viability of bighorn sheep populations and their habitat due to the appeals received by the forest supervisor.[115] A viable population can be defined as "a population of a species that continues to persist over the long term with

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113. *See generally* U.S. FOREST SERV., VIABILITY PROCEDURES FOR USE IN FOREST PLAN REVISION 1 (2010), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5181243.pdf [hereinafter FOREST PLAN REVISION].

114. *Id.* at 1 (emphasis omitted).

115. *See generally Payette Record of Decision*, *supra* note 4.

sufficient distribution to be resilient and adaptable to stressors and likely future environments."[116]

The viability of a population is not an easy calculation to make, because forest managers must take into account a number of considerations that revolve around policy, law, and science.[117] Therefore, federal agencies must use the best available scientific literature to aid in their decision-making.

VII. CASE LAW REVOLVING AROUND TIERING

The case law centering on tiering sets forth several guideposts that federal agencies should follow when tiering to broader documents. Although the current case law does not set down any bright line rules pertaining to whether a federal agency could explicitly use the Forest Service's FSEIS, an analysis from the case law may lead down several paths that allow a regional program to incorporate the data found in the 2010 Payette National Forest's FSEIS so that agencies on a parallel threshold could benefit from the work done by the Forest Service.

A. *Glisson v. U.S. Forest Service*

In *Glisson v. U.S. Forest Service*, a 1993 decision, the court gave analysis of tiering coupled with possible exceptions that may exist.[118] There, a *pro se* litigant brought suit against the United States Forest Service opposing an ecological restoration program of a resource management plan, which would incorporate hardwoods into areas where pine plantations existed allowing the Forest Service to restore the ecosystem to its natural state.[119] The plan was referred to as the Amended Land and Resource Management Plan for the Shawnee National Forest and the plaintiff specifically keyed in on an area of the forest known as Opportunity Area 6.[120] Prior to the existence of pine plantations, the area was dominated by hardwood trees, but the early settlers harvested the trees and

116. 36 C.F.R. § 219.19 (2012).

117. FOREST PLAN REVISION, *supra* note 113, at 2.

118. *See* Glisson v. U.S. Forest Serv., 876 F. Supp. 1016 (S.D. Ill. 1993).

119. *Id.* at 1020.

120. *Id.*

farmed the area intensively until the Great Depression, where subsequently the farmers were forced to abandon the land.[121] The federal government purchased the land back and then began its initial plan to plant pine trees to control soil erosion.[122] The Forest Service's plan to plant hardwoods back into the area was not a short term fix for the area, but was on the long term agenda for the agency as part of the Amended Forest Plan.[123]

The basis of the pending lawsuit seeking judicial review was that the removal of the pine plantations violates the National Forest Management Act because the pine plantations were home to pine warblers, a management indicator species for the forest that would be extirpated if the pine plantations were removed.[124] The plaintiff further alleged that the Forest Service should have conducted an EIS evaluating the condition of the native species that depend on pure pine, rather than simply conducting an EA.[125] The court agreed with the Forest Service, and found that the EA for Opportunity Area 6 could be tiered to the Final Supplemental EIS that was created for the Amended Forest Plan.[126] The district court relied on case law that had been created in a Seventh Circuit decision regarding a similar action. The Seventh Circuit's precedent was "that once an EIS has been issued for a Forest Plan, the Forest Service generally is not required to prepare additional EISs for every site-specific project that is authorized under the Plan."[127]

The Court in *Glisson* went further to note that certain exceptions may exist when an agency is looking to tier to a broader document, such as a final supplemental EIS created for a forest plan.[128] The major exception noted by the court was that if there

121. *Id.*

122. *Id.* at 1021.

123. *See id.*

124. *See* Glisson v. U.S. Forest Serv., 876 F. Supp 1016 (S.D. Ill. 1993).

125. *See id.* at 1023.

126. *Id.* at 1033.

127. *Id.*

128. *Id.*

had been "changed circumstances or new information" available to the agency, then the original EIS will not be adequate to serve as a foundation for EAs created at a later date.[129] If this situation presents itself before an agency, then it is mandatory that the agency prepare a new EIS looking at the environmental consequences for the site-specific project.[130] Yet the court, in this circumstance at least, does not explain what kind of new information or changed circumstances would require the agency to produce an updated EIS. It does not even create a spectrum for future courts and agencies to follow, which creates a large grey area for federal agencies when they are deciphering whether tiering is even an option on the table.

B. *Muckleshoot Indian Tribe v. U.S. Forest Service*

A controversial case that came to a different outcome while analyzing tiering was *Muckleshoot Indian Tribe v. U.S. Forest Service*.[131] There, the Forest Service was contemplating a land exchange with a private company that would help unify land ownership pursuant to 43 U.S.C. § 1716, which was also premised on the ideal that it would be in the public's best interest for the land exchange to occur.[132] The Forest Service initially created a list of six alternatives that it would consider before commencing the land exchange.[133] In 1996, the agency "released a draft EIS," followed by a period for public comment.[134] After issuing the Final EIS, the agency concluded, through its Record of Decision, that it would not pursue a "no action" alternative, but would pursue one of the other possible alternatives that had been evaluated pending the land exchange, which coincidentally would allow the land exchange to occur.[135] The parties exchanged the lands after the Office of the Regional Forester had denied appeals that were received regarding

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129. *See id.*

130. *See* Glisson v. U.S. Forest Serv., 876 F. Supp 1016 (S.D. Ill. 1993).

131. Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800 (9th Cir. 1999).

132. *Id.* at 803.

133. *Id.*

134. *Id.*

135. *Id.* at 813.

the EIS and ROD.[136] Shortly thereafter, the private party announced that it intended to log the lands it received from the Forest Service.[137]

The plaintiffs instigated this action seeking declaratory and injunctive relief that would essentially stop the exchange from occurring.[138] The Forest Service proclaimed that it had tiered the Final EIS to the Mt. Baker Snoqualmie National Forest Land and Resource Management Plan.[139] The forest service contended that because it was tiered to the LRMP, it had sufficiently analyzed any potential cumulative impacts of the exchange.[140] The court defined cumulative impact pursuant to its definition in the Code of Federal Regulations.[141] It is:

> [T]he impact on the environment which results from the incremental impact of the action when added to other past, present and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.[142]

The court keys into the significance of future impacts, and the requirement of the agency to analyze those future impacts in an EIS.[143] That analysis provides insight to the agency decisionmaker, which provides them the opportunity to make a decision that benefits the environment, or allows them to alter the proposed

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136. *See id.* at 804.

137. Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800 (9th Cir. 1999).

138. *Id.* at 803.

139. *Id.* at 810.

140. *Id.*

141. *Id.* at 809.

142. 40 C.F.R. § 1508.7 (1978).

143. *See* Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 810 (9th Cir. 1999).

action to lessen any negative cumulative impacts.[144] The plaintiff contended that the EIS did not adequately consider the cumulative impacts of logging in a prior Land and Resource Management Plan EIS.[145] The court held that if tiering should occur, it is only allowed in the instance where the tiered document is being tiered to another EIS.[146] The court found that the specific EIS for the exchange did not include an in-depth analysis of the possible effects that the exchange could produce, most notably the cumulative impacts of logging by the private party because at the time that the prior EIS was created the current exchange was only speculative.[147] Even though the EIS included quite a few sections titled "cumulative effects," the sections provided only general and broad statements, not a concrete or thorough analysis.[148] Therefore, as described by *Muckleshoot Indian Tribe*, if an agency is to tier a document, the document they tier must not be so general as to leave out past, present, or foreseeable future impacts of the harm that could cause the inadequate preparation of an EIS.[149] The document that a federal agency tiers to should be an EIS that has undergone the rigorous assessment of NEPA review because the EIS is a more detailed and rigorous assessment of possible environmental impacts.

C. *Native Ecosystems Council v. Dombeck*

In *Native Ecosystems Council v. Dombeck*, the natural resource issue revolved around logging on public lands.[150] The Department of Agriculture and Department of Interior had an action brought against them allegedly "stemming from [an] improper approval of timber sale[s] on National Forest land."[151] The sale was "part of a larger, Congressionally-authorized program" that al-

144. *Id.* at 810.

145. *Id.*

146. *Id.* at 811.

147. *Id.* at 812.

148. *Id.* at 810.

149. Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 811 (9th Cir. 1999).

150. Native Ecosystems Council v. Dombeck, 304 F.3d 886 (9th Cir. 2002).

151. *Id.* at 890.

lowed the federal government to acquire over 50,000 acres of private land, but in order to gain the necessary funding to purchase the land, the Forest Service was permitted to sell timber.[152] The Gallatin National Forest Plan had a pertinent Forest Plan in place that quantified requirements for road densities through a Habitat Effectiveness Index (HEI), which is an indicator of how open roads and motorized trails may affect habitat used by elk.[153] The original Forest Plan calls for an HEI of 70% be maintained throughout the forest; but after the logging in the area, newly constructed roads that needed to be maintained would lower the HEI under the 70% threshold, which would only rise after logging was completed if road closures occurred.[154]

In order to circumvent the requirement set forth in the Forest Plan regarding the HEI requirement, the Forest Service chose to create a site-specific amendment to the Forest Plan waiving the HEI requirement because it deemed that road closures were not necessary.[155] The plaintiffs argued that the defendants had failed to comply with NEPA and the Endangered Species Act.[156] The court distinguished between EAs and EISs noting that EAs were "the less comprehensive [form] of the two" and supported this with statistical evidence.[157] The court found that "[a]n EA [could] be deficient if it fails to include a cumulative impact analysis or [failed] to tier to an EIS that reflect[ed] such an analysis."[158] The court also noted that each cumulatively significant effect could individually be a minor assessment, but taken as a whole there could be an underestimate of all the cumulative effects on the environment. This could occur if the managing agency prepares an EA instead of an

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152. *Id.* at 890.

153. *Id.*

154. *Id.* at 890–91.

155. *Id.*

156. Native Ecosystems Council v. Dombeck, 304 F.3d 886, 891 (9th Cir. 2002).

157. *Id.* at 896. "[I]n a typical year, 45,000 EAs are prepared compared to 450 EISs… Given that so many more EAs are prepared than EISs, *adequate consideration of cumulative effects requires that EAs address them fully*." *Id.*

158. *Id.* at 895–96.

EIS.[159] A cumulative impact "is the impact on the environment which results from the incremental impact of the action when added to other past, present, or reasonably foreseeable future actions."[160] The "amendment to the Forest Plan [that waived] the HEI requirement" was found to be in violation of NEPA, because even though it tiered to a previously created EIS, it did not sufficiently take into account the possibility of future adverse impacts on the environment from other timber sales in the area.[161]

D. *Kern v. United States Bureau of Land Management*

In *Kern v. United States Bureau of Land Management*, individual citizens and environmental groups brought a suit against the Bureau of Land Management (BLM) alleging that the BLM had failed to adequately consider the impact of root fungus on a specific variety of cedar, which they perceived as a violation of NEPA.[162] Under the Federal Land Policy and Management Act (FLPMA) "the BLM published an EIS for the . . . Coos Bay District" as required for the proposed Range Management Plan (RMP).[163] The significant environmental harms that the agency was tasked to look at was the effects of a root fungus on the Port Orford Cedar.[164] Because the BLM was going to take an action that significantly "affect[ed] the quality of the environment" then it had to adhere to NEPA, which imposes a requirement of preparing an EIS, unless there is a categorical exclusion.[165] Depending on the nature of the action, some categorically require that the agency prepare

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159. *Id.* at 896.

160. *Id.* at 895.

161. *Id.* at 891.

162. Kern v. United States Bureau of Land Mgmt., 284 F.3d 1062, 1066 (9th Cir. 2002).

163. *Id.* at 1067.

164. *Id.* The fungus can be spread a number of ways, but it has been found that it can be specifically spread through human activities. These activities "include timber cutting, road construction and maintenance, off-road vehicle use, livestock grazing, and commercial cedar bough and mushroom collection." *Id.*

165. *Id.*

an EIS while others do not.[166] But, if the agency is not required to prepare an EIS then as a result it must prepare an EA (EA).[167] An EA is similar to an EIS, but brevity is the key difference.[168] The EA is a concise document available to the public that the federal agency is responsible for creating.[169] Similar to the EIS, the EA contains evidence and analysis that would allow the agency to produce a decision to either create an EIS or a Finding of No Significant Impact (FONSI).[170] The court in *Kern* noted that if the agency had created an earlier EIS that had evaluated the possibilities of the effects of the root fungus on the cedar while analyzing the environmental consequences for the Coos Bay RMP,[171] then it could have tiered later documents, such as a mandatory EA, to those prior documents to avoid wasteful and unnecessary duplication.[172] Although "[t]iering, or avoiding detailed discussion by referring to another document containing the required discussion, is expressly permitted by federal regulations . . . tiering to a document that has not itself been subject to NEPA review is not permitted, for it circumvents the purpose of NEPA."[173] The court held that the BLM could not tier to the earlier Coos Bay RMP, because that document never had an EIS created for it that considered the effects of the root fungus and allowed a period for public comment and review.[174]

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166. *Id.* An agency must first decide whether creating an EIS is necessary. Federal statute mandates that an EIS should be created if the proposed action "(1) normally requires an EIS, or (2) normally does not require either an EIS or an EA." 40 C.F.R. § 1501.4 (1978).

167. *Kern*, 284 F.3d at 1067.

168. 40 C.F.R. § 1508.9 (1978).

169. *See id.*

170. *Id.*

171. "By definition, preparation of an RMP is a 'major Federal action significantly affecting the quality of the human environment,' and so categorically requires preparation of an EIS." *Kern*, 284 F.3d at 1067.

172. *See id.* at 1072.

173. *Id.* at 1073.

174. *See id.*

NEPA review controls the process of tiering, so the reasoning in this case regarding tiering showed that federal agencies cannot bypass NEPA review, because it is a procedural restraint and agencies must comply with it. Despite the BLM's attempt to create an EIS specifically tailored to looking at the environmental concerns associated with the Coos Bay RMP, the BLM failed to account for reduction and minimization of the spread of the root fungus. This inadequacy in the original EIS does not allow the BLM to sidestep its evaluation of the environmental consequences of the root fungus on the cedar by simply tiering to the original EIS.

E. *Oregon Natural Resources Council Fund v. Forsgren*

In *Oregon Natural Resources Council Fund v. Forsgren*, a 2003 case that was decided in federal district court, environmental groups brought an action challenging the validity of timber harvesting in an area managed by the United States Forest Service.[175] The area was inhabited by the threatened Canada lynx.[176] In 1990, an EIS (EIS) was completed and promulgated by the Forest Service laying out a Forest Plan to manage the area.[177] During the creation of the 1990 EIS, the Forest Service knew that the Canada lynx used the forest for habitat, but did not outline any specific guidelines or management standards to protect the lynx or its habitat.[178]

"In 1998, the [United States Fish and Wildlife Services] proposed an [Endangered Species Act] listing of the lynx," and thereafter officially listed the species as threatened in April of 2000.[179] After the proposed listing of the lynx in 1998, the Forest Service and Fish and Wildlife Service conducted a number of studies to seek more information about the lynx and its habitat.[180] These procedures included mapping lynx habitat and compiling scientific documents produced by lynx experts about the lynx, its prey, and

175. Or. Nat. Res. Council Fund v. Forsgren, 252 F.Supp.2d 1088, 1091 (D. Or. 2003).

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 1091–92.

180. *Id.* at 1091.

general information about its habitat.[181] The primary document, where all the information could be found, was in the Lynx Conservation Assessment and Strategy (LCAS) document.[182] After the lynx was listed as threatened, that same year the interagency Steering Committee released a revised LCAS that included new criteria regarding mapping directions.[183] There were two programmatic documents regarding lynx that had received public review and comment, but otherwise the LCAS was not subject to the procedures instigated by NEPA or NFMA.[184] The defendants contended that the Revised LCAS was not a "final agency action or a major federal action sufficient to trigger a NEPA analysis."[185] Yet the court found that the action was significant, because the mapping directions and the Biological Assessments affected the decision to engage in timber sales, which directly affected the lynx.[186] Therefore, the Forest Service improperly tiered the Biological Assessments to the mapping directions in the LCAS, both of which had not undergone a public review or comment period.[187] Once again, this case presents the resounding statement that broad documents that have not undergone NEPA review are inadequate pieces of work to tier smaller pieces of work to. Furthermore, an agency cannot circumvent NEPA by declaring that the action is not significant and tiering two non-NEPA documents together to aid them in a decision that would affect the environment.

F. *Arkansas Wildlife Federation v. U.S. Army Corps of Engineers*

Another case that incorporates the impacts of tiering while also speaking to the issue of whether a tiered document contains

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181. *Forsgren*, 252 F.Supp.2d at 1091.

182. *Id.*

183. *Id.* at 1092. In August 2000 a second edition of the LCAS was released, but the document was issued without public participation or review. *Id.*

184. *Id.* at 1093. The two documents that were subject to public comment and review were the 1990 Forest Plan and its forest EIS. *Id.*

185. *Id.* at 1107.

186. *Id.*

187. *Forsgren*, 252 F.Supp.2d at 1107.

the appropriate cumulative impact analysis is *Arkansas Wildlife Federation v. U.S. Army Corps of Engineers*.[188] Appellants brought an action alleging that the appellee had violated NEPA in connection with its Grand Prairie Area Demonstration Project.[189] The issue in that case revolved around ground water depletion from two main aquifers, the Alluvial and the Sparta.[190] The appellees had found that if the aquifers were not maintained and regulated, both would be depleted.[191] Therefore, the appellees created the Grand Prairie Project with the objectives of maintaining irrigation access to farmland and preserving the aquifers.[192] The appellees claimed that they complied with all the procedural steps mandated under NEPA by creating an Environmental Impact Assessment (EIS), creating a list of alternatives, soliciting public comments, as well as producing a Record of Decision.[193] A Draft EA was also created which was issued for public comment and subsequently issued in a Final EA (FEA) alongside a Finding of No Significant Impact (FONSI) analysis.[194]

The appellants specifically claimed that the alternative the appellees had chosen was not the most reasonable decision because it had not considered all of the other feasible alternatives, and that the Corps had improperly tiered the minimum flow requirements of the FEIS to the Arkansas State Water Plan.[195] In specific regard to tiering the court stated that "[a]n FEA will be ruled deficient only if it does not include a cumulative impact analysis or is not tiered to an EIS that contains such an analysis."[196] Thereafter, the

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188. Ark. Wildlife Fed'n v. U.S. Army Corps of Eng'rs, 431 F.3d 1096 (8th Cir. 2005).

189. *Id.* at 1098.

190. *Id.* at 1098–99.

191. *Id.* at 1099. The Alluvial served as an irrigation source for farmers, while the Sparta provided drinking water to local residents in conjunction to supplying the waters needs of local industry. *Id.*

192. *See id.* A more thorough list of objectives can be found in the case. *See* Ark. Wildlife Fed'n, 431 F.3d at 1098.

193. *See generally id.*

194. *Ark. Wildlife Fed'n*, 431 F.3d at 1100 (8th Cir. 2005).

195. *Id.* at 1099.

196. *Id.* at 1101.

court found that since the FEA updated and provided a sufficient analysis of any new environmental cumulative impacts it was properly tiered to the Final EIS, and withstood judicial scrutiny.[197] The court also noted that a FEA is likely not able to provide both clarity and brevity while still providing a detailed answer for every environmental impact question that should be addressed.[198] Therefore, an agency can rely on its cumulative impacts analysis from a previous final EIS, but the most current EA must account for any changed conditions that could possibly affect the cumulative impacts analysis. The standard that the court reiterates does not create a bright-line rule, but creates a guiding path that allows agencies to make an informed decision, and update their current conditions to conform with mandatory requirements. Also, this court found that an agency can tier to a document that provides guidelines, such as the Arkansas State Water Plan, but the resulting document must include a sufficient cumulative impacts analysis if one does not exist in the broad document.[199]

G. *Sierra Club Northstar Chapter v. Bosworth*

In *Sierra Club Northstar Chapter v. Bosworth*, a case that dates back to 2006, the plaintiffs brought an action against the Chief of United States Forest Service and Secretary of U.S. Department of Agriculture challenging the validity of a timber harvesting project.[200] The plaintiffs alleged that the Forest Service had violated NEPA by concluding that the FONSI document was inadequate, and furthered their argument by claiming that the defendants should have prepared an EIS.[201] The timber harvesting project, known as the Tomahawk Project, was proposed in July of 2003, and while it was being configured, the Forest Service was in the process of revising the Land and Resource Management Plan

197. *Id.*

198. *Id.* at 1102–03.

199. *Id.* at 1101–02.

200. Sierra Club Northstar Chapter v. Bosworth, 428 F. Supp. 2d 942, 942, 945 (D. Minn. 2006).

201. *Id.* at 947.

for the Superior National Forest.[202] As part of the plan, the Forest Service prepared a Forest Service Plan Revision EIS.[203] Revisions were made and the final forest plan was adopted in July of 2004 (2004 Forest Plan).[204] The 2004 Forest Plan created a series of management areas and landscape ecosystems that were within the Superior National Forest, which also encompassed the Tomahawk Project Area.[205] The Forest Plan set out a number of objectives that revolved around biological, physical, social, and economic needs while also setting forth "desired conditions for each landscape ecosystem."[206]

Prior to the completion of the 2004 Forest Plan, the Forest Service prepared the Tomahawk Project Area EA pursuant to NEPA where it incorporated an Interdisciplinary Planning Team of specialists to solicit comments from the public, state and government agencies, and Indian Tribes.[207] The team evaluated and reviewed the comments received; this subsequently resulted in four alternative management actions.[208] The agency decided that alternative four would be the best path to follow, and it did "'not constitute a major Federal action, individually or cumulatively, and [would] not significantly affect the quality of the human environment.'"[209] Therefore, all the efforts put forth into the TPEA resulted in a conclusion where creating an EIS was not necessary.[210] A major component to the court's holding came from the decision in *Sierra Club v. Bosworth*, also known as *Sierra Club Big Grass*.[211] There, the

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202. *Id.* at 946. The Superior National Forest encompasses the Tomahawk Project Area, which was being pursed for timber harvesting activities. *Id.* at 945.

203. *Id.* at 946.

204. *Id.*

205. *Sierra Club Northstar*, 428 F. Supp. 2d at 946.

206. *Id.*

207. *Id.*

208. *Id.* at 947.

209. *Id.*

210. *Id.*

211. *Sierra Club Northstar*, 428 F. Supp. 2d at 947 (referencing *Bosworth*, 352 F. Supp. 2d at 909).

Forest Service was planning timber harvesting activities in a corridor between two sections of the Boundary Waters Canoe Area Wilderness (BWCAW), an area adjacent to the Tomahawk Project.[212] The Forest Service prepared a Supplement Information Report because it "treated the case as new information under 40 C.F.R. § 1502.9."[213] In essence, the Forest Service concluded that the "information brought forward by the Court in the [Sierra Club] Big Grass decision has been appropriately addressed in the [TPEA], Decision Notice and project record . . . [and that] the FONSI for this project is appropriate to determine that an [EIS] is not necessary for the Tomahawk Project."[214]

The defendants in *Bosworth* claimed that the TPEA had been tiered to the 2004 Forest Plan; therefore, the underlying EIS and the 2004 Forest Plan would provide the most relevant insight for the court in reviewing that case.[215] The plaintiffs claimed that all major federal actions that significantly affect the quality of the environment are required to complete an EIS due to the guidelines set forth in NEPA.[216]

The 2004 Forest Plan, according to the plaintiffs, did not contain specific analysis of the potential impacts to the BWCAW that would transpire out of the Tomahawk Project.[217] The first point the court noted in its analysis was that an agency could prepare a large programmatic EIS and when specific components were ready to be

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212. *Id.*

213. *Id.*

214. *Id.* ("Sierra Club" was added to this sentence, other bracketed information comes from the original source) (referencing Bosworth, 352 F. Supp. 2d at 909).

215. *Id.* at 949.

216. *Id.* Here, the Forest Service planned for, through Alternative 4, a multitude of actions to commence including clear cutting, partial-cut harvest, commercial thinning, and prescribed burning. Sierra Club Northstar, 428 F. Supp. 2d. at 951. The alternative also allowed for the "construction of temporary access roads, the conversion of unclassified National Forest System (NFS) roads, the reuse of existing NFS road corridors, and the decommissioning of unclassified and NFS roads." *Id.* at 947.

217. *Id.* at 949.

implemented at a later date, it could thereafter conduct a site specific EA.[218] This rule was gleaned from the Eighth Circuit's decision in *Heartwood, Inc. v. U.S. Forest Serv*ice.[219] Moreover, this would alleviate countless hours of work constructing an EIS.[220] Nevertheless, in *Bosworth*, the court explicitly came out and stated that part of the rationale behind the tiering concept was to "avoid[] [a] repetitive discussion[] and [] focus [primarily] on [the] ripe issues" before the agency.[221] The court found that the TPEA had blatantly disclosed that it had been tiered to the 2004 Forest Plan, and the purpose of the tiering was to incorporate the 2004 Forest Plan into the TPEA as a reference rather than a repetition.[222] The 2004 Forest Plan was used solely to issue the objectives and purposes that the defendants had for the Superior National Forest and served as a broad level guide for any site-specific analyses that would come down the pipe.[223] The court held that this was an appropriate use of tiering.[224]

H. *Defenders of Wildlife v. Bureau of Ocean Energy Management*

In *Defenders of Wildlife v. Bureau of Ocean Energy Management*, an environmental group brought an action alleging that the Bureau of Ocean Energy Management (BOEM) had created an exploration plan that violated NEPA.[225] BOEM had a history of complying with NEPA regulations and had previously used a tiered process in its creation of EISs and EAs, which was encouraged by federal statutes.[226] In creating its exploration plan BOEM sought

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218. *Id.*

219. *Id.*; Heartwood, Inc. v. United States Forest Serv., 380 F.3d 428 (8th Cir. 2004).

220. *Sierra Club Northstar*, 428 F. Supp. 2d at 949.

221. *Id.*

222. *Id.* at 949–50.

223. *Id.* at 950.

224. *Id.*

225. Defs. of Wildlife v. Bureau of Ocean Energy Mgmt., 684 F.3d 1242, 1246 (11th Cir. 2012).

226. *Id.* at 1247.

to avoid repetitive large scale discussion and tailor its focus on those specific issues at hand.[227]

BOEM had tiered a site specific plan, which was narrow in scope, in order to rely on prior broader analyses provided by two EISs, the 2007 Multisale EIS and a 2009 Supplemental EIS.[228] The petitioners in the case argued that the two EIS's were outdated and could not be tiered due to a recent disaster that resulted in an massive oil spill.[229] The court noted that BOEM could validly tier to previous EIS's that had evaluated circumstances surrounding drilling at that current time while incorporating new mitigation measures that had transpired following the Deepwater Horizon disaster, which BOEM did.[230] The court found that BOEM's reliance on previously known information was not arbitrary because "(1) BOEM included known information about the [Deepwater Horizon] spill in the Shell [exploration plan] EP and (2). . . BOEM reported that the conclusions from the most recent supplemental EIS would not alter any conclusions presented in the 2007 and 2009 EIS's."[231] This case illustrated that when an agency is tasked with tiering cite specific EISs, or exploration plans as they were named here, tiering provides an avenue that provides efficiency; which avoids wasteful and duplicative resources even if unprecedented circumstances have arisen since past EISs were completed. However, the agency must incorporate any relevant or mitigating factors into the tiered review for the current EIS to be valid.

I. *Western Watersheds Project v. Lueders*

In *Western Watersheds Project v. Lueders*, an environmental group brought an action against the BLM in Nevada challenging the validity of an EA that pertained to the approval of a watershed

227. *Id.*

228. *Id.* at 1251.

229. *Id.*

230. *See id.*

231. *Defs. of Wildlife*, 684 F.3d at 1251.

plan.[232] The watershed plan sought to treat vegetation conditions that had been deteriorated due to drought, fire suppression efforts, and livestock overgrazing.[233] The plaintiff's main contention was that BLM's proposal to improve vegetation conditions would detrimentally impact sage-grouse habitat.[234] The BLM issued its final Cave Valley and Lake Valley Watersheds Restoration Plan EA in November 2012, finding that action needed to be taken to improve vegetation conditions, and within less than a month the plaintiff had filed an appeal alongside a petition for a stay.[235] The final EA tiered to the cumulative impacts analysis contained "in the Ely Proposed Resource Management Plan . . . Final EIS . . ., as well as the Programmatic EIS on Vegetation Treatments Using Herbicides on Bureau of Land Management Lands in 17 Western States . . ., and the Ely District Integrated Weed Management Plan & EA."[236] These previous documents had been subject to NEPA review, and contained the necessary credibility as they had been comprised of independent studies and research while weighing the pros and cons of the vegetation treatment before the defendants concluded that the plan was in the publics' best interest.[237] The court also found that the BLM went beyond its scope in discussing past, present and reasonably foreseeable future actions in the final EA, which buttressed and analyzed issues talked about in documents that it had tiered to.[238]

Tiering may not disregard the requirement of the preparation of an EIS if the current project proposal significantly affects the environment.[239] If documents are previously subjected to NEPA review that have analyzed the cumulative impacts of past, present, and reasonably foreseeable future action, the court will likely hold that the requirements prior to tiering are satisfied in the Ninth

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232. Western Watersheds Project v. Lueders, 122 F.Supp. 3d 1039, 1044 (D. Nev. 2015).

233. *Id.* at 1043.

234. *See id.*

235. *Id.* at 1044.

236. *Id.* at 1046.

237. *See id.* at 1050–51.

238. *Lueders*, 122 F.Supp. 3d at 1051.

239. *Id.* at 1046.

Circuit's jurisdiction. Therefore, depending on the action, an analysis of the cumulative impacts pertaining to the project may or may not be required if the broader document has a sufficient explanation of the cumulative impacts.

VIII. FEDERAL AGENCIES COULD POSSIBLY TIER TO THE FOREST SERVICE'S DOCUMENTS THAT WERE CREATED TO ASSESS BIGHORN SHEEP VIABILITY IN THE PAYETTE NATIONAL FOREST

The case law decisions and statutory regulations that were enacted to enable and regulate tiering maintain their focus around a single project, single agency, and to a single geographic area, although programmatic EISs can be created for national or regional guidelines. The bighorn sheep crisis creates a rare, yet unique opportunity to efficiently look at whether other agencies could benefit from the work done by the Forest Service, the agency which is at the helm of the Payette National Forest, while taking into account other regional guidelines that have been produced by the Western Association of Fish and Wildlife Agencies for example. In this unique situation, geography is not the limiting factor and disease transmission occurs whether the Bureau of Land Management is the controlling agency or the Forest Service is the controlling agency. Moreover, disease transmission is not controlled by geography as its boundary; it is holistically centered on whether domestic sheep are commingling with, or contacting bighorn sheep in prescribed public grazing allotments.

Even though the Forest Service was not able to use the objectives from the document created by the Western Association of Fish and Wildlife Agencies (WAFWA), the amendment to the Forest Plan contained some predating conclusions that could be argued as finding their way into the guidelines set out by the document that WAFWA produced.[240] WAFWA generated a regional attempt to create a uniform management plan with 'best management practices' (BMPs) objectively seeking to guide federal, state, and private entities in maintaining domestic sheep grazing, while simultaneously protecting bighorn sheep habitat areas.[241] Those BMP's specifically

240. *See generally* WILD SHEEP WORKING GROUP, *supra* note 6, at 3.

241. *Id.*

sought to keep domestic sheep and goats from straying away from public allotments, while establishing more rigid formalities to respond to stray animals.[242]

That document specifically notes that agencies could possibly tier to the WAFWA document when those agencies are looking at the viability of bighorn sheep in their respective geographical areas.[243] Even though the document incorporates scientific literature it breathes breadth, rather than depth in its scope.[244] Furthermore, the WAFWA document does not look into cumulative impacts that agencies may need to indicate or the breadth of scope that should be taken when mitigating the removal of domestic sheep from bighorn sheep areas.[245] Because the regional plan generated by WAFWA was not published until 2012,[246] the forest supervisor for the Payette National Forest did not have an opportunity to tier to WAFWA's document for the FSEIS for the Payette National Forest. Another important factor pertaining to tiering as seen in *Kern v. United States Bureau of Land Mgmt* for example, is that if an agency is going to tier to documents created at an earlier point in time, those documents must have been subject to NEPA review.[247] The WAFWA document does not appear to have gone through a public comment and review period, which is a critical stage of NEPA procedure. Rather it was created by an interagency panel, and was revised by the department heads of the U.S. Forest Service, Bureau of Land Management, National Park Service, U.S. Fish and Wildlife Service, "U.S. Fish and Wildlife Service, Bureau of Reclamation, and Department of Defense."[248]

The FSEIS produced by the Forest Service in 2010 to supplement the 2003 Southwest Ecogroup Land and Resource Management Plan FEIS for the Payette National Forest did go through NEPA review and was found to be coherent with legal standards

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242. *See id.*

243. *Id.*

244. *See generally id.*

245. *See generally id.*

246. WILD SHEEP WORKING GROUP, *supra* note 6, at Cover Page.

247. *See generally* Kern v. U.S. Bureau of Land Mgmt., 284 F.3d 1062 (9th Cir. 2002).

248. WILD SHEEP WORKING GROUP, *supra* note 6, at 3.

according to the Ninth Circuit's recent decision.[249] The ROD was compiled based on the cumulative impacts and different alternatives analysis presented in the Draft Supplemental EIS.[250] The DSEIS presented an update on the analysis surrounding Rocky Mountain bighorn sheep and their viability within the Payette National Forest. On appeal to the Ninth Circuit, the Idaho Wool Growers Association challenged three main points that revolved around the final supplemental EIS; the challenges were:

> (1) failure to consult the Agricultural Research Service…before preparing the FSEIS and ROD, (2) failure to supplement the FSEIS and ROD in light of the publication in 2010 of a certain study of the transmission of disease from domestic to bighorn sheep, the "Lawrence study", and (3) choice and use of particular models to evaluate the risk of contact between domestic and bighorn sheep and the effects of disease transmission.[251]

The most notable conclusion made by the supervisor in the FSEIS was that the transmission of bacteria between domestic sheep and bighorn sheep likely occurs through direct contact between the two species, which as noted in the ROD was "not fully understood."[252] Moreover, the supervisor also found in the FSEIS that no single study conclusively showed that contact between bighorn sheep and domestic sheep can lead to bighorn die-offs.[253] But, when all of the available research is combined a common thread can be found, and that thread is pneumonia causing bacteria in domestic sheep poses a risk to free-ranging bighorn sheep, when the bighorn sheep contract the bacteria.[254]

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249. *See generally* Idaho Wool Growers Ass'n v. Vilsack, 816 F.3d 1095 (9th Cir. 2016).

250. *See generally* U.S. DEP'T OF AGRIC. FOREST SERVICE, UPDATE TO THE DRAFT SUPPLEMENTAL IMPACT STATEMENT (2010).

251. *Idaho Wool Growers Ass'n*, 816 F.3d at 1099.

252. U.S. DEP'T OF AGRIC. FOREST SERVICE, FINAL SUPPLEMENTAL EIS xx (2010).

253. *See id.* at 3–11.

254. *See id.*

Due to discoveries related to disease transmission and the relevant evidence that appeared before the Forest Service, it compiled a list of twenty-eight alternatives of which fourteen were heavily scrutinized and provided the basis for the forest supervisor's decision.[255] The forest supervisor for the Payette National Forest found that one alternative, Alternative 7E, had the least probable contact between species, and provided the most protection to bighorn sheep, while two additional alternatives, Alternatives 7N and 7O, revealed low contact rates.[256] Alternatives 7M and 7P had probable moderate contact rates, but still did not mesh as good as Alternatives 7N and 7O in providing a valid buffer for bighorn sheep.[257] These findings were constructed through the Risk of Contact Model.[258]

The other two models that the supervisor used in making her decision included the Disease Model and the Source Habitats Model.[259] The Disease Model looked at potential disease outbreaks in bighorn sheep if they came into contact with domestic sheep at low, moderate, and high probabilities.[260] Looking at the Disease Model scientists found that under a low probability of disease outbreak all of the bighorn sheep populations in the Payette National Forest had a high probability of persistence under Alternatives 7M, 7N, 7O, and 7P.[261] Under the moderate risk probabilities column, scientists found mixed results and noted that Alternatives 7M, 7N, 7O, and 7P could possibly have the highest persistence levels for maintaining two distinct populations, i.e., bighorn and domestic sheep.[262] Under high probability assumptions of disease transmission scientific modeling found that three populations had

255. *Payette Record of Decision*, *supra* note 4, at 19.

256. *See id.* at 21–22.

257. *See id.*

258. *Id.* at 14.

259. *See id.* at 11, 12.

260. *Id.* at 23.

261. *Payette Record of Decision*, *supra* note 4 at 23.

262. U.S. DEP'T OF AGRIC. FOREST SERVICE, *supra* note 252, at 1-16.

a high probability of extinction under all alternatives, excluding Alternative 7O.[263]

The list of alternatives ranged from deeming all the acres previously used to graze domestic sheep as unsuitable for grazing, to reducing less than 10 percent of all suitable acres for grazing. Aided by extensive literature and a variety of risk models, the supervisor found Alternative 7O to meet the required legal standards, while providing the most viability for bighorn sheep to maintain their herd population.[264] Another influential factor, which most likely played a large part in the reduction of grazing, was that bighorn sheep were added to the Sensitive Species list on July 29, 2009.[265] That listing was a preventative measure to help the agency facilitate and maintain a viable population of native bighorn sheep before a listing under the Endangered Species Act could occur.[266]

The FEIS would work for other agencies located in similar situations because the FSEIS divulges into an in-depth alternatives analysis, and takes into account any cumulative effects on the environment.[267] The alternatives were fully analyzed by breaking down the statistical evidence that was produced through the disease model, summer source of habitat model, and the risk of contact model.[268] The Forest Service used the models to analyze the best possible alternative that would reduce the number of contacts between bighorn sheep and domestic sheep, while still trying to preserve domestic sheep grazing in the Payette National Forest.[269] Furthermore, the Forest Supervisor provided a cumulative effects analysis that dissected all the probable outcomes that could occur depending on the alternative that was chosen.[270] Therefore, the

263. See *id.*

264. *See* PAYETTE RECORD OF DECISION, *supra* note 4, at 13.

265. *See* U.S. DEP'T OF AGRIC. FOREST SERVICE, *supra* note 252, at 1-8.

266. *Id.*

267. *See generally id.* at 2-13, 3-82.

268. *See id.* at 2-13–2-16.

269. *See id.* at 2-18.

270. *See id.* at 3-90.

Ninth Circuit found that the FSEIS meshes with current NEPA requirements.[271]

However, the looming question is whether agencies on a parallel threshold could use the work that was done for the Payette National Forest. If a national or regional policy was adopted that accounted for all the recent scientific literature and was then subsequently pushed through the NEPA review process where the public had a period to comment and review the work, it might be a viable alternative. Furthermore, no case law exists where a federal agency has used the work created for one specific geographic area and tiered it to their own respective geographic area. This strategy would likely result in litigation, which would set the judiciary up to solve the resounding problem. In order for an agency to do this there has to be areas where agencies are facing the current dilemma between bighorn sheep and domestic sheep.

A. Areas Where Tiering could be Beneficial in the Future

In order for tiering to be efficient on a regional or national scale, it is imperative that other Federal agencies that are faced with the bighorn sheep dilemma have a uniform document that has incorporated the most credible scientific literature in order to make tiering successful. Those geographical areas where tiering would be successful must include public lands managed by a federal or state agency, and domestic sheep must be grazing next to, or near bighorn sheep habitat areas; which could possibly implicate that the two species are contacting one another, increasing the probability of mortality in bighorn sheep due to disease transmission. Two specific examples are the San Juan National Forest in Colorado and the Medicine Bow National Forest in Wyoming; both are managed by Federal agencies.

In 2013, the Bureau of Land Management (BLM) and U.S. Forest Service (USFS) released a Final EIS along with a Land and Resource Management Plan pertaining to the San Juan National Forest (SJNF) in Colorado that addressed future management direction and the appropriate use of the forest for future programs

271. Idaho Wool Growers Ass'n v. Vilsack, 816 F.3d 1095, 1110 (9th Cir. 2016).

and plans.[272] The USFS and BLM noted in the FSEIS that the bighorn sheep populations have risen over the past twenty years, but there is an issue of disease transmission that likely occurs due to physical contact between bighorn sheep and domestic sheep.[273] The USFS monitoring of the SJNF has not resulted in the confirmation of any bighorn die-off events since 1988.[274] But, this can likely be traced to the fact that there is a very small amount of overlap between range that is used for domestic sheep grazing, and habitat areas for bighorn sheep.[275] This relatively low overlap is the product of standards and guidelines that were adopted by the agencies to prevent and mitigate the potential of physical contact between the two species.[276] As the FSEIS is a programmatic document, this level of decision-making does not correspond to specific project decisions;[277] so in order to make further viability decisions of bighorn sheep the USFW would have to take a narrower approach in its creation of an EIS or EA and the decisions that result thereof.[278] A list of alternatives were presented in the Land and Resource Management Plan that would potentially guide the agencies in making a decision if it became an area that needed to be assessed.[279] Because the Land and Resource Management Plan is such a current document, there have not been any documents released stating that the agencies have received any appeals over the bighorn viability portion of the plan.

Another national forest that allows domestic sheep grazing, in conjunction to managing bighorn sheep herds, is the Medicine Bow

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272. U.S. DEP'T OF AGRIC. FOREST SERVICE, VOLUME 1: FINAL EIS FOR SAN JUAN NATIONAL FOREST (2013), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5434480.pdf.

273. *Id.* at 128.

274. *Id.* This die-off occurred after it was observed that domestic sheep came into a close proximity with bighorn sheep and contact was presumed to have occurred. *Id.*

275. *Id.*

276. *Id.*

277. U.S. DEP'T OF AGRIC. FOREST SERVICE, *supra* note 272, at vi.

278. *See id.* at 174.

279. *Id.* at 175.

National Forest in Wyoming.[280] Similarly situated to the Payette National Forest this area once served as grazing grounds to over 250,000 head of domestic sheep, but that number has been reduced to less than 10,000.[281] The Forest Service, which is the managing federal agency, has continued to take proactive steps toward overseeing the viability of bighorn sheep populations; one of the most recent attempts being through the Final EIS, which provided the backbone for the Record of Decision released in December of 2003.[282] But like most Forest Management Plan decisions, a number of appeals were raised.[283] In a summary of the appeals and a list of consolidated decisions by the reviewing officer, she noted that the bighorn sheep viability assessment was not updated to appropriate management standards.[284] The alternative that was chosen in the Forest Management Plan ran contrary to the statutory regulation, which dictates that Forest Service's main objective should be to maintain the viability of all of the bighorn sheep herds.[285] Therefore, going forward, the Regional Forester was instructed to assess management strategies that would maintain consistent populations in all the bighorn herds located in the Medicine Bow National Forest.[286]

The previous two examples are two instances where future litigation will create a backdrop for disgruntled groups, whether they are environmental organizations, agriculturists, or industrialists,

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280. *See generally* Christy Martinez, *Bighorn sheep targeted on Medicine Bow National Forest*, WYLR.NET, http://www.wylr.net/wildlife/3518-bighorn-sheep-targeted-on-medicine-bow-national-forest (last visited Feb. 15, 2017).

281. *Id.*

282. *See generally* U. S. DEP'T OF AGRIC. FOREST SERV., MEDICINE BOW NATIONAL FOREST: FINAL EIS AND REVISED LAND AND RESOURCE MANAGEMENT PLAN RECORD OF DECISION (2003).

283. *See* Gloria Manning, *Consolidated Decision for Appeals of the Medicine Bow National Forest Revised Land and Resource Management Plan* 26 (Feb. 16, 2006), https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5163211.pdf.

284. *Id.* at 29. One major concern regarding bighorn sheep viability in the Medicine Bow LRMP was that continued domestic sheep grazing near one of the three major bighorn herds would cause the extirpation of that herd. *Id.* at 28.

285. *See id.* at 29. *See also* 36 C.F.R. § 219.19 (2016) (presenting the definition of viable population).

286. *Manning*, *supra* note 283, at 29.

to sue federal agencies because their decisions do not protect bighorn sheep viability in their fullest capacity, or reduce domestic sheep numbers on grazing allotments by a drastic amount. Creating a unified document that addresses the risks posed to bighorn sheep will build a foundation and starting point for federal agencies to tier their own site-specific documents too. The underlying goal would be to reduce the tension between environmental groups and agriculturists or industrialists through the collaboration of a broad document that both sides would possibly find favorable. The science behind the decisions is one area that needs to be synchronized, because even in the two previous examples, the federal agencies are relying on different research to buttress their documents.[287]

IX. CONCLUSION

There is no immediate solution to the slow and cumbersome process of decision-making regarding projects, actions, and programs on federal lands. Federal agencies objectively attempt to make the most correct decisions at the earliest possible times, but creating EISs, EAs, and Land and Resource Management Plans to support those decisions most likely create a time lag in the system that can possibly jeopardize the lands themselves, or the native species on the lands. Recently, the Bureau of Land Management promulgated rules that will likely take aim at better management practices of public lands through the preparation process of Resource Management Plans.[288] The final rule, Planning 2.0, will increase public participation in the planning process at an earlier stage; reduce the time the public has to comment on an amendment to a RMP; incorporate the highest quality information and most

287. The Medicine Bow National Forest consolidated decision's document relied on a 2001 document produced by Schommer and Woolever, while the Land and Resource Management Plan for the San Juan National Forest relied on a 1971 document created by Geist and a 1996 document generated by Martin. *Id.* at 26–27; U.S. DEP'T OF AGRIC. FOREST SERVICE, *supra* note 272, at 128.

288. U.S. Dep't of the Interior Bureau of Land Mgmt., *Planning 2.0: Improving the Way We Plan Together* (June 9, 2016), https://www.blm.gov/wo/st/en/prog/planning/planning_overview/planning_2_0.html.

relevant science available to the agency; and present a more comprehensive and informative planning assessment up front.[289] Hopefully, this rule will lay the foundation for other federal agencies to produce similar rules that will help speed up the long process of decision-making on federal lands.However, as the process works now, tiering is the most strategic decision that a federal agency can make in order to relieve inefficient time spent preparing EISs, EAs, and Forest Plans, and the unnecessary duplication of limited resources. If a document was created in a manner consistent with that of the Final Supplemental EIS to the Payette National Forest on a national or regional scale, provided that it follows the necessary guidelines set forth in NEPA, it would likely serve as a backbone for federal agencies situated similar to that of the Forest Service in *Idaho Wool Growers Association v. Vilsack* to tier to in future situations.[290] A national or regional document might merely adopt or outline the alternatives analysis and cumulative effects that were created by the supervisor of the Payette National Forest, which could then result in a scientifically credible document that subordinate federal agencies could adopt to their respective situations.

In order to prevent degradation of public lands, federal agencies have a duty to manage those lands with the best possible outcome in mind. Tiering would allow agencies to protect the viability of bighorn sheep while maintaining opportunities for domestic sheep grazing to occur.

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289. U.S. Dep't of the Interior Bureau of Land Mgmt., *Fact Sheet: BLM's Proposed Planning Rule* 1, https://www.blm.gov/style/medialib/blm/wo/Planning_and_Renewable_Resources/planning_images.Par.11752.File.dat/Planning2_0_Factsheet_FINAL.pdf (last visited Feb. 15, 2015).

290. Idaho Wool Growers Ass'n v. Vilsack, 816 F.3d 1095 (9th Cir. 2016).